STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2007
v	No. 262978 Tuscola Circuit Court
DAWN MARIE BOOTERBAUGH, Defendant-Appellant.	LC No. 04-009103-FC

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions of negligent homicide, MCL 750.324, and manslaughter, MCL 750.321. Defendant was sentenced to serve concurrent prison terms of 16 months to 2 years for the negligent homicide conviction and 7 to 15 years for the manslaughter conviction. We affirm.

I. FACTS

On September 4, 2003, defendant was driving eastbound on Snover Road in Tuscola County. Riding in defendant's car were defendant's minor daughter, Jenna; defendant's niece, Brenda Ambris; and Brenda's two minor children, Brenna and Jeffrey. After the car went over a steep hill on the road, an accident ensued. Testimony at trial indicates that the car "left the ground" over the center of the roadway, came "down hard enough on the other side of the hill to make a divot in the road before it lost control," and eventually collided with two trees. There was also testimony at trial that the vehicle was traveling at a speed from about 53-68 mph when the accident ensued. Several residents of Snover road, as well as the officer responsible for crash reconstruction, testified that a safe and prudent speed was between 35-40 mph. Defendant, Brenda, and Jenna were seriously injured in the accident. Brenna and Jeffrey were killed.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that the trial court abused its discretion when it denied her motion for a new trial based on ineffective assistance of her trial counsel. We disagree.

A. Standard of Review

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Lonsby*, 248 Mich App 375, 382; 707 NW2d 610 (2005). However, we review de novo the underlying issue of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

B. Analysis

In general, a defendant who asserts that he has been denied the effective assistance of counsel must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must overcome the strong presumption that counsel rendered effective assistance. *Id.*

(1) Failure to Call Witnesses

Defendant asserts that trial counsel was ineffective because she failed to call two witnesses (defendant's sister and a friend) who would testify that defendant was shopping for a dress for her daughter on the day before the accident at the time that witnesses claim that they saw a car similar to defendant's driving down Snover Road at a high rate of speed. Generally, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of trial counsel. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

The record does not support defendant's contention that defense counsel's trial strategy was unsound. The cases cited by defendant in which the defense counsel failed to investigate witnesses involve witnesses who would testify that the defendant was either not present at the time that the crime was committed or was physically unable to commit the crime. *Matthews v Abramajtys*, 319 F3d 780, 789 (CA 6 2003); *Barnes v Elo*, 231 F3d 1025, 1029 (CA 6 2000). In this case, defendant neither disputes that she was present in the car when the accident occurred or that she was physically capable of driving the vehicle so as to lead to the victims' deaths. Moreover, the trial court correctly noted that the testimony of defendant's proposed witnesses concerned the collateral matter of whether defendant had driven on Snover Road on the day before the accident. Indeed, there is no showing that the failure to call these two witnesses to testify about this collateral matter deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

(2) Failure to Object to Officers' Testimony

Next, defendant argues that trial counsel erred by not objecting to the testimony by two police officers that they had never before seen a vehicle torn in half and that the video recreation of the accident did not depict how horrible it really was. Defendant asserts that the statements were logically and legally irrelevant, as well as unfairly prejudicial and inflammatory. However, defendant has failed to show how the officers' testimony prejudiced her. The defense put forward by defendant presupposed that the accident was horrific. Defendant's argument was that she did not intend to create a risk that such an accident occur. Testimony that an accident in which two children died was horrific did not unfairly impugn defendant's theory of defense.

(3) Failure to Remove Jurors

In addition, defendant argues that trial counsel was ineffective because she failed to remove three jurors from the panel. In general, a trial counsel's decisions relating to the selection of jurors involve matters of trial strategy that we will decline to evaluate with the benefit of hindsight for the purposes of an ineffective assistance of counsel claim. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). "Jurors are presumed to be competent and impartial and the burden of proving otherwise is on the party seeking [the juror's] disqualification." *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987).

We have held that a juror who expresses a negative opinion referring to some circumstance of the case but swears that he can render an impartial verdict, may not be challenged for cause. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). In this case, two of the jurors in issue indicated that they would be able to serve impartially. The third, who indicated that her children had been involved in a drunk driving accident, only expressed a concern that her personal experience could impact her decision. However, when specifically asked whether she was willing to render a verdict based on the facts adduced and the law as explained by the court, the juror indicated she was so willing. Under these circumstances, we do not find counsel's decision not to seek to remove the jurors to be an objectively unreasonable strategy. Moreover, in light of the evidence adduced, defendant has not shown that the outcome of the trial would have been different had the jurors been removed.

III. OVERCHARGE

Defendant argues that the trial court abused its discretion when it denied her motion for a new trial based on the allegation that the prosecution overcharged her with second-degree murder, MCL 750.317. We disagree.

A. Standard of Review

In general, the prosecution "is given broad charging discretion." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). The prosecutor has discretion to bring any charges supported by the evidence. See *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996).

B. Analysis

The offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Defendant claims that there was insufficient evidence regarding the element of malice. The element of malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* Malice for second-degree murder can be "inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

In this case, there was evidence that defendant intentionally committed an act in "wanton and wilful disregard of the likelihood that the natural tendency of such behavior [was] to cause death or great bodily harm." *Goecke*, *supra* at 464. At trial, the prosecution adduced testimony and evidence that there were unrestrained children in the back seat of the car and that defendant knew that they were unrestrained while she drove down Snover Road. The prosecution also offered testimony that defendant intended to attempt to jump the hill on Snover Road despite the fact that defendant's niece warned her to slow down. Finally, there was evidence that defendant did not have due regard for the conditions of the roadway while driving on it using an excessive speed. Therefore, because there was evidence to infer the element of malice, the question was one for the jury, *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997), and the trial court did not err in denying defendant's motion for a new trial.

IV. PROSECUTORIAL MISCONDUCT

Next, defendant asserts that the trial court abused its discretion when it denied her motion for a new trial based on misconduct in the prosecutor's closing remarks. We disagree.

A. Standard of Review

For allegations of prosecutorial misconduct, we examine the pertinent portion of the record below and evaluate the prosecutor's remarks to determine whether they denied defendant a fair trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

B. Analysis

The prosecutor made the following comments during his closing argument:

> The defendant made the decision to continue driving down that dirt road, up a hill that she could not see over at 70 miles an hour, 68 to 70 miles an hour minimum as was explained by the crash reconstructionist to the point that she's in the middle of the road, where she ends up in the opposite lane of travel, loses control of the vehicle, crashes into a tree, severs the vehicle in two for all practical purposes, killing Jeffrey and Brenna.
>
> *The only surprising part of what happened that day on Snover Road at 6:00 o'clock in the evening is that more people didn't die because of the conduct that this defendant engaged in that day*. [Emphasis added.]

Defendant argues that the prosecutor's comment was intended to appeal to the jury's fear of crime. In general, it is improper for prosecutors to resort to civic duty arguments that appeal to jurors' generalized fears or prejudices. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, the prosecutor's remarks in this case, when taken in context, do not constitute an appeal either to the jurors' civic duty to convict or to their generalized fear of crime. Rather, the remarks were a fair response to defendant's theory of the case, which was essentially that she was driving too fast but that she did not intend to create a risk of death or serious injury. We have previously found such a response by the prosecution acceptable. *People v Thomas*, 260

Mich App 450, 454; 678 NW2d 631 (2004). Further, "[a] prosecutor need not limit . . . arguments to the blandest possible terms." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005) (internal quotations omitted).

Defendant's next claim of error relates to the following remarks made by the prosecutor:

> Brenda Ambris tried to protect her children. What on earth could the children do in this case? The most innocent of the victims? They're in this vehicle while she made the decision to drive in the manner that she did.
>
> * * *
>
> Jeffrey Ambris was four years old, obviously had no control over what occurred to him in this car.
>
> Brenna Ambris was one year old, had no control of what happened to her in this car. Brenda asked the defendant to change her driving.

Defendant claims that these remarks were an improper appeal to the jury's sympathy. Generally, appeals to the jury to sympathize with the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Defendant cites *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988), in which we held that a prosecutor's repeated comments appealing for the jurors' sympathy for the "poor innocent baby" were improper. However, in the instant case the prosecutor's comments are significantly unlike those found objectionable in *Dalessandro*. *Id.* at 580-581 (finding that the prosecutor committed misconduct when saying, "Look at the pictures of this little innocent baby. Look at the terror on his face, the sadness in those eyes. . . . this little babe, totally innocent little baby was crying out in pain."). Further, as previously noted, "[a] prosecutor need not limit [his] arguments to the blandest possible terms." *Williams*, *supra* at 71 (internal quotations omitted).

Finally, defendant alleges that the following comment by the prosecutor was intended to improperly vouch for the credibility of the police witnesses:

> *In this case, this case was thoroughly investigated, completely investigated*. The information has been explored, and her guilt has been established beyond a reasonable doubt.
>
> Hold her accountable for killing the two young children in that car that day, and find here [sic] guilty of Second Degree Murder. Thank you. [Emphasis added.]

In general, "[a] prosecutor may argue the credibility of the witnesses and the guilt of the defendant, but may not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge." *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). After looking at the challenged remarks in context, we conclude that the prosecutor was simply intending to note that, in a case where reconstruction of the accident was central, the police conducted a thorough investigation. Such a statement does not constitute

prosecutorial misconduct. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996)

V. CUMULATIVE ERROR

Defendant next contends that the cumulative effect of the above alleged errors denied defendant of her due process right to a fair trial. However, because we have found no errors with regard to the above issues, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

VI. OPPORTUNITY TO ALLOCUTE

Finally, defendant asserts that the trial court erred by denying defendant an opportunity to properly allocute at sentencing. We disagree.

A. Standard of Review

This Court reviews the sentencing transcript de novo to determine if defendant was denied his right of allocution. *Brandt v Brandt*, 250 Mich App 68, 75; 645 NW2d 327 (2002).

B. Analysis

Defendant's challenge is to the order in which allocution occurred. In relevant part, MCR 6.425(D)(2)(c)[1] states as follows:

> (1) At sentencing the court, complying on the record, must:
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence

Denying defendant's motion for resentencing, the trial court stated the following: "The rule says the defendant, right, defense lawyer. Now I do the defense lawyer, then the defendant, then the prosecutor and the victim. That's what I do as a matter of order. So maybe you want to seek an amendment to the rule or something. I don't know."

Defendant cites our Supreme Court's opinion in *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980), for the proposition that "[o]rdinarily the [opportunity for allocution] . . . should come immediately before the sentence is pronounced and after the trial court has made such remarks as it deems appropriate . . . ." However, *Berry* has been overruled by *People v*

[1] This is the court rule in effect when defendant was sentenced. However, MCR 6.425 has since been amended, and this provision can now be found at MCR 6.425(E)(1)(c).

Petit, 466 Mich 624; 648 NW2d 193 (2002). *Petit* stated that the court rule means only that the trial court

> must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed. However, in order to provide the defendant an opportunity to allocute, the trial court need not "specifically" ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses. [*Id*. at 628.]

In this case, defendant was offered an opportunity by the trial court to allocute, which she accepted. Defendant has not cited any authority other than *Berry*, which has been overruled, that requires a trial court to offer a defendant the opportunity to allocute at any specific time during a sentencing hearing.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette